IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1117 of 1986

For Approval and Signature:

HONOURABLE MR. JUSTICE J.R. VORA

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
CHHOTABHAI BABARBHAI PARMAR & ORS

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Appearance :
MR. PRADI D BHATE APP for Appellant
MR NITIN M AMIN for Opponents

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 23/08/2007

ORAL JUDGMENT :(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 Instant Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by learned Additional Sessions Judge, District – Kheda at Nadiad, on 30th of April, 1986, in Sessions Case No. 133 of 1985, whereby all the five respondents herein being accused of the Sessions Case No. 133 of 1985 came to be acquitted by the Trial Court for the offences charged against them under Sections 302, 324, 504, 147, 148, 149 and 326 to read with Section 34 of the Indian Penal Code.

2 A charge sheet for the above offences came to be filed against all the accused in the Court of Chief Judicial Magistrate, First Class, on 03rd of September, 1985, which was registered as Criminal Case No. 1770 of 1985 and said Case, vide order dated 14th of October, 1985, was committed to the Court of Sessions and was registered as Sessions Case No. 133 of 1985.

3 Briefly depicting the case of prosecution, it is revealed that the incident in question took place on 28th of February, 1985 at village Dehgam. On earlier day of the incident i.e. on 27th of February, 1985, in the evening at about 8.00p.m. one election meeting was arranged and Congress Party Leader Fulsinh Dabhi was to address the public. People

were gathered there and accused No.1 also was amongst them. Injured in this case Ravjibhai Fatabhai and complainant of this case Fatabhai Rajabhai both were present. Accused Chhotabhai Babarbhai came in the public meeting in drunken condition and started speaking in cavalier manner. Injured Ravjibhai persuaded accused No.1 and stated that the meeting was in progress and accused No.1 should attend the meeting calmly. On the contrary, accused No.1 was provoked and challenged Ravjibhai that if he wished to fight with him, Ravjibhai was free to come out. It appears that there were some altercations between the parties and public meeting was dispersed. Other persons persuaded accused No.1 and was sent to his house.

4 In pursuance of the above incident of earlier day, the present incident occurred on 28.02.1985 at about 10.00 a.m. It was alleged that all the five accused formed an unlawful assembly, quarreled with injured Ravjibhai and to achieve common object to teach lesson to Ravjibhai and to beat him, all the accused assembled near the house of Budhabhai Khatarbhai Raval. At about 10.30 a.m. Ravjibhai i.e. PW-3 and Udesinh Dahyabhai, who is deceased in the incident, both, according to prosecution case, had been to temple of Mahadevji to have darshan. They were coming back from temple and when they reached near the house of Budhabhai Khatarbhai Raval,

they found that accused Nos.1 and 2 i.e. Chhotabhai Babarbhai and Ravjibhai Babarbhai Parmar were standing with dharias in their hands. Accused No.1 called Ravjibhai by shouting "come here". PW-3 Ravjibhai went near accused No.1 and accused No.1 stated that why Ravjibhai was advising him to be calm down in the public meeting and thereafter picked up quarrel with Ravjibhai. Accused No.1 inflicted a dharia blow on the head of Ravjibhai. To ward the blow, Ravjibhai raised is right hand and the blow landed on the right hand of Ravjibhai, causing serious injuries. Accused No.1 Chhotabhai Babarbhai again inflicted second blow on the head of Ravjibhai. Udesinh Dahyabhai, deceased in the case, to save Ravjibhai, intervened, and at that time, deceased Udesinh had a cogged part of dharia with him. Accused No.1 attempted to snatch the said cogged part of dharia from deceased Udesinh. Accused No.2 Ravjibhai Babarbhai, at that time, inflicted two instant blows on right shoulder of deceased Udesinh and accused No.1 Chhotabhai Babarbhai gave a knocking blow on the throat of Udesinh. Thereupon, Udesinh had fallen on the ground and in the meantime PW-5 Chandubhai came near the opening of the hedge where the quarrel was taking place and at that juncture, accused Nos. 3, 4 and 5, who had concealed themselves around the hedge came at the scene of offence. Accused No.3 Kantibhai Ravjibhai inflicted a blow of dharia on the ankle of right leg of Ravjibhai

and so Ravjibhai had also fallen down on the ground. PW-5 Chandubhai Vaghabhai requested accused not to beat Ravjibhai and Udesinh. Thereafter accused ran away from the spot. According to prosecution, Udesinh Dahyabhai died on the spot and PW-3 Ravjibhai was unconscious. Father of Ravjibhai i.e. complainant Fatabhai Rajabhai, came to know about the incident by shouts of the village persons and, therefore, though he was at his house, he came running at the scene of offence and found that Udesinh Dahyabhai and his son Ravjibhai, both were lying on the ground and PW-5 Chandubhai Vaghabhai was standing there. He inquired from Chandubhai Vaghabhai as to who had beaten these two persons. Chandubhai replied that both had been beaten by accused No.1 Chhotabhai Babarbhai and accused No.2 Ravjibhai Babarbhai and asked Fatabhai Rajabhai to arrange to shift both of them to hospital. Complainant Fatabhai Rajabhai thereafter went to his village for obtaining a vehicle to shift injured to hospital, but there was no vehicle in the village and, therefore, he and his neighbour one Ashabhai Vanabhai came on the road at the place known as “Sixth Mile”. From Sixth Mile, they got a bus for Vaso town and they reached at Vaso at about 2.30 p.m. They straightaway went to Vaso Police Station and declared that two persons were injured at village Dehgam. The police personnel present there advised the complainant that if the injured were serious, first they must be shifted to the hospital

and thereafter complaint could be recorded. Complainant and Ashabhai Vanabhai both from Vaso road obtained one tempo and came to Dehgam at the scene of offence, and in the said tempo, injured Ravjibhai and deceased Udesinh Dahyabhai were taken to the Government Hospital at Vaso and thereafter complainant Fatabhai gave his complaint before Vaso Police Station at 15.30 hours against accused Nos. 1 and 2. A crime came to be registered as aforesaid in Vaso Police Station and investigation was handed over to PW-12 Girdharlal Ratanlal Gadhavi. He visited Primary Health Center and arranged an inquest panchnama in respect of Udesinh Dahyabhai and thereafter had drawn the panchnamas of scene of offence and had recorded the statements of the witnesses, had arrested the accused and had drawn discovery panchnamas at the instance of the accused. Ultimately, as aforesaid, charge sheet came to be filed against five accused .

5 The learned Additional Sessions Judge framed charges for the above said offences against all the five accused individually as well as collectively vide Exhibit – 3 on 20.1.1986. All the five accused pleaded not guilty to the charge and, hence, prosecution tendered oral as well as documentary evidence.

6 In oral evidence, PW-1 Dr. Rajendraprasad Dhirajlal Purani, examined at Exhibit – 9, who was the Medical Officer, Primary Health Center at given time, had examined three persons, Ravjibhai, Udesinh and accused No.1 Chhotabhai Babarbhai and Udesinh. Udesinh was brought dead and he deposed about the injuries of other two persons. PW-2 Fatabhai Rajabhai - complainant, is examined at Exhibit – 14. PW-3 Ravjibhai Fatabhai, injured, is examined at Exhibit – 17. Dr. Mukesh Indukumar Shukla is examined as PW-4, Exhibit – 18, who was Medical Officer in Civil Hospital at Ahmedabad and on 28.2.1985, at 7.10 p.m. he had examined injured Ravjibhai Fatabhai, who was referred to him by transfer Yadi. He deposed about the injuries of the injured. PW-5 Chandubhai Vaghabhai, examined at Exhibit – 20; PW-6 Shankarbhai Raisingbhai, examined at Exhibit – 21; PW-7 Raijibhai Malabhai, examined at Exhibit–22 and PW-10 Jesingbhai Pujabhai, examined at Exhibit – 27, are the four eye witnesses of the prosecution. PW-14 Dr. Ramanlal Hiralal Makwan, examined at Exhibit-60, was serving as Medical Officer at Civil Hospital, Nadiad, treated the injured accused - Chhotabhai Babarbhai on 28.2.1985. PW-8 Valimohmad Satarbhai, examined at Exhibit–23, is a panch witness of panchnama at Exhibit–24 drawn by the police on 1st of March, 1985, by which it was alleged that accused No.2 Ravjibhai Babarbhai discovered mudammal article dharia. PW-9 Ashabhai

Gothabhai, examined at Exhibit 25, is second panch of panchnama at Exhibit-24. PW-11 Vikrambhai Purshottam Prajapati, examined at Exhibit – 45, is an Executive Magistrate, who recorded dying declaration of Ravjibhai Fatabhai Parmar at Ahmedabad on 1st of March, 1985. PW-12 Girdharlal Ratanlal Gadhavi, examined at Exhibit-49, was the then PSI of Vaso Police Station and he recorded the complaint of Fatabhai Rajabhai and investigated the crime. PW-13 Ranachodbhai Hamirbhai Padhiar is second Investigating Officer, who took charge of the investigation from Police Sub-Inspector Mr. Gadhavi on 13.3.1985 and he submitted the charge sheet, as aforesaid.

7 In documentary evidence, important documents like injury certificates, arrest panchnama, panchnama of scene of offence, panchnama of seizure of clothes of the deceased and injured, forwarding letter to Forensic Science Laboratory forwarding therewith muddamal articles, opinion of Forensic Science Laboratory, map of scene of offence, dying declaration of injured Ravjibhai Fatabhai, complaint as given by Fatabhai Rajabhai, etc. are produced on record.

8 Thereafter, statements of the accused were recorded by the learned Sessions Judge in respect of incriminating circumstances appearing in the evidence under Section 313 of the Code of Criminal

Procedure. After denying the evidence in toto of the prosecution, accused Nos. 1 and 2 submitted on record their written further statements at Exhibits 72 and 74. Accordingly, accused No.1 stated that his father Babarbhai Dhulabhai was sarpanch of the village and leading worker of the area and they supported Janata Party as against Congress Party. In the Assembly Election, candidate of Janata Party was elected on account of their support and, therefore, the accused party being supporters of the Congress Party, had grudge against them. On 27th of February, 1985, in public meeting of Fulsinhbhai Dabhi, he stated to Fulsibhai that they visited village only when election was ensuing and except that they did not care for the village and he started to ask questions in the public meeting. Fulsibhai could not reply and, therefore, crowd was shouting and to avoid quarrel, his relatives had taken him to his house to save from opposite party. On the day of the incident, after having darshan at Mahadevji temple, he was returning to his house. When he reached near the house of Budhabhai Khatarbhai Raval, without any weapon in his hand, he found that deceased Udesinh Dahyabhai, Ravjibhai Fatabhai and Chandubhai Vaghabhai were standing there with dharias in their hands and shouting at him. They stated that they wanted to teach him a lesson for breaking Congress Party meeting. On apprehension that he would be beaten by the opposite party, through the hedge of the house of

Budhabhai Khatarbhai Raval, he went inside of the house and the said house had no doors, the opposite party i.e. the above three persons also chased him in the house of Budhabhai Khatarbhai Raval. Therefore, he picked up one dharia lying in the house of Budhabhai Khatarbhai Raval and requested these three persons not to beat him. Even then, they attacked him and he raised shouts to save him. Ravjibhai Fatabhai and Udesinh Dahyabhai started inflicting dharia blows on his body and injuries were caused on his chest, on his hands and on his back. Many blows were parried by him and to save his life he wielded his dharia and that caused injuries to Ravjibhai and Udesinh. In the meantime, people gathered there with sticks and dharias and they also had beaten Ravjibhai and Udesinh and thereafter on account of vertigo, he had fallen down on the ground and had become unconscious. From there he was shifted to his house and his elder brother Ravjibhai had thereafter come and he had narrated the incident. Ravjibhai had given a complaint against three persons before Vaso Police Station. He was then taken to Vaso hospital and from there he was transferred to Nadiad Hospital where he was an indoor patient for long time. During that period, he filed his bail application and therefore he was arrested and was discharged from the hospital. He was sent to Nadiad Jail and, ultimately, was released on bail on 20th of March, 1985. He had pain in his ribs and obtained treatment from Orthopaedic Surgeon

Dr.Kshatriya. He had taken x-rays of his ribs which he produced on record and the certificates issued by the Doctor that there were fractures in his ribs and certificates were also produced by accused No.1. He informed the Investigating Officer about this, but nothing was done on account of political pressure on Investigating agency.

9 While accused No.2 Ravjibhai Babarbhai Parmar stated in his written statement that his brother's wife Chambapen conveyed to him that Udesinh Dahyabhai, Ravjibhai Fatabhai and Chandubhai Vaghabhai had beaten his brother Chhotabhai and therefore Chhotabhai was injured. He thereupon went to the house of Chhotabhai and inquired about the incident. He found that Chhotabhai – accused No.1 was seriously injured and therefore he shifted Chhotabhai to the hospital and gave a complaint before Vaso Police Station for the same incident, which was registered as Criminal Case No. 29 of 85 for the charges under Sections 326 and 324 of the Indian Penal Code. His brother was serious and, therefore, he was shifted to the hospital at Nadiad.

10 After recording of the further statements, the learned Trial Judge heard prosecution as well as defence and came to the conclusion to acquit the accused, as stated above and, hence, this Appeal.

11 Learned APP Mr. Pradip D Bhate on behalf of appellant State submitted vehemently that the evidence of witnesses, particularly of injured witness Ravjibhai, has not been properly considered by the Trial Court and, hence, this wrong conclusion. In support of Ravjibhai, the evidence of complainant Fatabhai Rajabhai is corroborative piece of evidence, which has been brushed aside by the Trial Court saying that the same was not reliable though, in fact, as per prosecution case there were other eye witnesses and those are PW-6 Shankar Raisinh, PW-7 Raijibhai Melabhai and PW-10 Jesinghbhai Pujabhai, but they have not supported the prosecution case, but PW-5 Chandubhai Vaghabhai has supported the prosecution case. Thus, according to learned APP, the evidence of injured witness Ravjibhai Fatabhai, complainant Fatabhai Rajabhai and eye witness Chandubhai Vaghabhai establishes the prosecution case above board and the appreciation of the Trial Judge appears to be perverse, more particularly, when the injures of Ravjibhai Fatabhai are proved by medical evidence. Not only that, the medical expert PW-1 Dr. Rajendra Dhirajbhai Purani deposed that the said injuries were possible by muddamal article dharias. There may be contradictions here and there, but it must be remembered that when complaint came to be filed and when the statements of the witnesses were recorded, particularly, injured Ravjibhai was in agony of injuries

and could not have remembered the incident picturesque and recollect and reproduce the same before the court. This fact itself must not weigh with the court to come to an adverse conclusion as to the occurrence of the incident. The evidence is required to be evaluated as a whole and not in piecemeal as has been done by the Trial Court. Explaining of injury on accused in all cases by the prosecution is not a universal rule and, therefore, on that count the findings arrived at by the Trial Judge are erroneous. Discovery of dharia is proved by panch witnesses, more particularly PW-9 Ashabhai and the Investigating Officer and this also is a corroborative piece of evidence, could not be ignored. Going through the reasoning given by the Trial Judge for the conclusion, learned APP submitted that the learned Trial Judge ought not to have placed much reliance upon minor contradictions in the evidence and, therefore, this Appeal is meritorious and required to be allowed. It is submitted that the death of Udesinh is proved by cogent evidence as homicidal death is not in dispute. It is submitted that the defence led by the accused through further statements is not probable in view of clear and cogent evidence of prosecution witnesses. It is further submitted that FSL report is also supporting the prosecution case.

12 As against that, learned Advocate Mr. Nitin M. Amin for the respondents – accused submitted that, in fact, the evidence of three

witnesses are required to be evaluated and which has been done by the Trial Court. PW-5 Chandubhai Vaghabhai was not an eye witness and that is well established by the evidence of Ravjibhai Fatabhai, who deposed that Chandubhai came only when the incident was over and he destroys the presence of PW-5 Chandubhai Vaghabhai at the scene of offence. It is submitted that complainant Fatabhai Rajabhai is formal witness and he is not an eye witness. He was informed by Chandubhai Vaghabhai, whose presence at the scene of offence, was doubtful and that complainant – Fatabhai Rajabhai could not explain the delay caused in filing the First Information Report. While Ravjibhai Fatabhai deposed before the court the incident in altogether different manner. Contradictions in his evidence as to the whole of the incident has been proved by the evidence of Investigating Officer, that, witness Ravjibhai Fatabhai did not state before the police which he stated before the Court. The injuries caused on accused No.1 could not be explained by the prosecution and those injuries are not minor nor superfluous. When evidence of the prosecution is ambiguous, serious injuries found on the body of the accused in the same incident is required to be explained by the prosecution, and in absence of which, adverse inference should be drawn against the prosecution case. It is an admitted fact that the cross complaint came to be filed against the prosecution witnesses and the said case was also committed to the Court of Sessions, but in the said

case, for the charge under Section 324 of the Indian Penal Code, the parties compromised the matter and the offence was compounded. The discovery of weapons as discussed by the learned Trial Judge, could not be proved by the prosecution beyond the reasonable doubt. Thus, in these circumstances, Budhabhai Khatarbhai Raval, in whose house, the incident took place, was a material witness and was not examined by the prosecution. It is submitted that, this is an Appeal, against the acquittal and unless the reasons and the findings given by the Trial Court are perverse, no interference is warranted and in this Appeal, the State could not establish that how the findings arrived at by the Trial Court are perverse. Therefore, it is submitted that the Appeal is required to be dismissed.

13 We have undertaken a complete and comprehensive appreciation of all vital features of the case and we have scanned the entire evidence on record with reference to the broad and reasonable probabilities of the case to ascertain whether the findings arrived at by the Trial Court are palpably wrong or perverse. We have gone through the each corner of record of the case and we have carefully scanned the reasons advanced by the Trial Judge to come to the finding of acquittal. We have taken into consideration the contentions raised by both the sides in this Appeal.

14 From the evidence of effective witnesses of the prosecution, i.e. PW-2 Fatabhai Rajabhai, Exhibit – 14, PW-3 Ravjibhai Fatabhai, Exhibit – 17 and PW-5 Chandubhai Vaghabhai, Exhibit - 20, it has been revealed that on 28th of February, 1985, at about 10.00 a.m. near the open space of the house of Budhabhai Khatarbhai Raval, accused No.1 inflicted blows by dharia on hands and on head of PW-2. During the incident, deceased Udesinh Dahyabhai intervened to save Ravjibhai Fatabhai from this attack, and at that time, accused No.2 Ravjibhai Babarbhai Parmar inflicted dharia blows on right shoulder of deceased Udesinh. Accused No.1 intentionally and carefully inflicted a knocking blow on the throat of deceased Udesinh, and on account of this, trachea was cut and Udesinh died on the spot. What is revealed by the evidence is, Udesinh fallen down on the ground after the attack and thereafter in two/three seconds, injured Ravjibhai had also fallen down on the ground. At this juncture, accused No.3 Kantibhai Ravjibhai Parmar inflicted one dharia blow on their right leg ankle of injured Ravjibhai and thus Ravjibhai got injuries and Udesinh died in the incident.

15 Whether this case is proved or not by the prosecution, by cogent and reliable evidence is matter of evaluation of evidence and the learned Trial Judge undertook that exercise in detail and came to the

findings that none of these three effective witnesses of the prosecution was reliable. It is therefore necessary to evaluate and assess the reasons assigned by the Trial Judge for not placing reliance on this three witnesses.

16 The learned Trial Judge noted that it was an admitted fact that there was a cross case for the same incident in which accused No.1 had injuries on his body, and that is evident from the evidence of Investigating Officer PW-12 Girdharlal Ratanlal Gadhavi, who in turn, in para-12 of his deposition, stated that in the said Criminal Case No. 29/85, Chandubhai Vaghabhai, prosecution witness in this case and accused in the said case, had presented two dharias duing investigation.

17 The learned Trial Judge also noted that in view of the decision of the Apex Court in the matter of LAXMANSINH vs. STATE OF BIHAR, as reported in 1976 Cri. L.J., page 1736, in this case also, serious injuries received by the accused No.1 in the same incident could not be explained by the prosecution witnesses and, therefore, the prosecution suppressed the genesis and the origin of the occurrence of the incident and not presented the true version. The learned Trial Judge also observed that the second presumption would be, the witnesses of prosecution, while denying the injuries on the person of the accused

were lying on most material points of the prosecution case and, therefore, their evidence was not reliable.

18 In light of above, the learned Trial Judge first noted injuries of PW-3 Ravjibhai Fatabhai as under :

i) Trans-verse incised wound on back of right forearm size 4" x 1 ½ x bone cut of.

ii) `Y' shaped lacerated wound on right occipital protuberance of head – size 3" x 1" x bone deep.

iii) Incised wound on dor-sum of right foot size 1" x 1/2" muscle deep.

Injured Ravjibhai was thereafter transferred to Ahmedabad Civil Hospital and according to the evidence of PW-4 Dr. Mukesh Indukumar Shukla, injured Ravjibhai had following injures.

i) C.L.W. - on the occipital region – 5 cm x 1 cm bone deep bleeding tut.

ii) C.L.W. - on post. Aspect of proximal 1/3 of rt. F.A. 5 cm x 2 cm x bone deep bleeding tut.

iii) Incised wound on dorsum of rt. foot - 1 cm x ¼ cm x skin deep - bleeding tut.

iv) Deformity on proximal 1/3 of rt. F.A.

v) X-ray skull shows depressed in the rt. parietal region.

vi) X – ray rt. F.A. Shows of radius ulna middle of the shaft.

vii) X-ray rt. foot 1st metatarsus bone.

19 Deceased Udesinh Dahyabhai, according to PW-1 Dr. Rajendraprasad Dhirajbhai Purani, had following injuries :

1. Lacerated wound on right shoulder – size 4” x 2” bone deep.
2. Incised wound 3” below the first injury on right shoulder - size 2” x 1 1/2” x 3”.
3. Oblique incised wound on right side of the neck size 2 1/2” x 1” x 3 1/2”. Trachea was cut off.
4. Vertical abrasion on back of the right thigh size 6” x 1/2”.
5. Trachea is cut off. Artery of the neck on right side was cut off.

As per the opinion of PW-1 Dr. Rajendraprasad Dhirajbhai Purani, the death of Udesinh was due to injury on vital organs of neck trachea and carotid artery of right side of neck and profuse bleeding. All the injuries were anti-mortem and thus there is no dispute that Udesinh had met with homicidal death.

20 According to PW-1 Dr. Rajendraprasd Dhirajbhai Purani, accused No.1 was brought along with these two persons to his Primary Health Center and on examination, he had following seven injuries :

1. An oblique incised wound on lower aspect of right side of the chest on mind axillary line – size 3” x 1” x bone deep.

2. Vertical incised wound on mid-line of head - size 6” x 1” x bone deep.

3. Incised wound oblique in direction on outer aspect of left arm. Size 2” x 1/2” x bone deep.

4. Transverse incised wound on back aspect of thumb of left palm - size 1” x 1/2” muscle deep.

5. Oblique incised wound on mid-line of back aspect of thorax size 2” x ½ muscle deep.

6. Vertical abrasion 8” long on left side of back aspect of thorax.

7. Oblique abrasion on right scapular region 4” long.

21 In this background, learned Trial Judge appreciated the evidence of effective three witnesses as under :

Referring to the evidence of complainant PW-2 Fatabhai Rajabhai, the Trial Judge observed that complainant omitted to state that who, in fact, informed him at his house about the incident and the prosecution did not examine any such witnesses. He stated that Shankarbhai Raising, Raijibhai Melabhai, Gotabhai Ramabhai (not examined) and Jesinghbhai Pujabhai met them in way and stated that Ravjibhai and Udesinh on one side and accused Nos. 1 and 2 on the other side were quarrelling and all the four were fighting amongst each other and, therefore, according to the Trial Judge it was proved that

initially as per the version of the prosecution case there were only four persons at the scene of offence and PW-5 Chandubhai Vaghabhai, alleged eye witness, was not present.

22 Considering the evidence of the complainant, the Trial Judge observed that on inquiring by the complainant from Chandubhai Vaghabhai, the complainant was conveyed by Chandubhai Vaghabhai that Ravjibhai PW-3 had been beaten by accused No.1 Chhotabhai Babarbhai, while deceased had been beaten by accused No.2 Ravjibhai Babarbhai. The complainant made it clear that PW-5 did not state anything further and thereby the involvement of accused Nos. 3, 4 and 5 in the incident was destroyed. The Trial Judge observed that the complaint itself, at the initial stage, was against accused Nos. 1 and 2 only and not against accused Nos. 3, 4 and 5 and till the filing of the complaint upto 15.30 there was no information available with the complainant that accused No.3 had inflicted a dharia blow on right ankle of the leg of injured Ravjibhai and, therefore, the story narrated in this respect by the prosecution was not reliable.

23 The learned Trial Judge observed that Fatabhai Rajabhai, father of the injured, was an interested witness and his evidence was required to be carefully seen. Learned Trial Judge observed that the

complaint was admittedly given at 15.30 hours at Vaso Police Station and the incident had occurred at 10.00 a.m. For this, the complainant attempted to give lame excuses in his deposition, but in complaint at Exhibit – 40, he stated nothing that how the complaint came to be filed late. The story narrated by him that he came to Vaso, hired a tempo, and thereafter shifted all the injured to the hospital, appears to be utterly wrong because PW-1 Dr. Rajendraprasad Dhirajbhai Purani in his deposition in categoric terms stated that deceased Udesinh, injured Ravjibhai and accused No.1 injured Chhotabhai Babarbhai, all the three were brought to the Primary Health Centre at 1.45 p.m., and that too, with police yadi. If this version of the prosecution is true, then what was stated by the complainant could not be believed and no explanation was coming forward from the complainant.

24 From the evidence of the Investigating Officer, it is found that at 1.45, complaint of the cross case was already recorded at Vaso Police Station, and this led to believe the Trial Court that the present complaint which came to be filed at 15.30 hours was a counter blast and, therefore, the Trial Judge did not place reliance on the evidence of complainant – Fatabhai Rajabhai and stated that the version given by the complainant was not inspiring any confidence appreciating his say with admitted circumstances of the prosecution case and more

particularly when it is an admitted fact that in the same incident accused No.1 was seriously injured.

25 The learned Trial Judge in this respect taking into consideration the evidence of the Investigating Officer and the statements recorded of the accused No.1 and submitted therewith document like x-ray, came to the finding that, in fact, accused No.1 had serious injuries like fractures in the ribs, which has been proved beyond doubt by the accused and throw doubt upon the reliability of the prosecution case.

26 While considering and appreciating the evidence of injured Ravjibhai, Trial Judge observed in para-17 that the present incident was the result of earlier incident occurred on previous day in public meeting of election campaign and, therefore, injured Ravjibhai when he deposed that the accused Nos. 1 and 2 called him near the house of Budhabhai Khatarbhai Raval appears to be a false statement because when there were skirmishes on previous day, it was improbable that the injured would have gone to the accused on their calling and more particularly, when the accused had weapons with them. So, according to the Trial Judge, injured Ravjibhai attempts to create a false story right from beginning. Though the learned Trial Judge took into consideration the

dying declaration recorded by the Executive Magistrate of injured witness relying upon a decision of the Apex Court in the matter of MAQSOODAN vs. STATE OF U.P., as reported at AIR 1983 SC 126, but the approach in this respect appears not to be correct as taken by the Trial Court as though dying declaration may be relevant evidence but its contents cannot be used as substantive evidence. Apart from this fact, the Trial Judge has further appreciated the evidence of injured Ravjibhai and has come to the conclusion that what had happened previous day and what was deposed by PW-3 Ravjibhai, led to the inference that, the conduct of injured was not natural in going to the accused on their calling. It is necessary because in such type of cases, it becomes necessary to establish by the prosecution that, how the quarrel had started. Thus, witness Ravjibhai, according to Trial Judge, described incident in his deposition in para-3 that, on calling the accused, he went to the accused and accused No.1 inflicted a blow by dharia. Udesinh had a cogged part of dharia in his hand (which is not the original prosecution case) and there was some attempt on the part of the accused to snatch said cogged part of dharia from the hand of deceased Udesinh, and thereafter accused No.2 Ravjibhai Babarbhai inflicted blows on deceased Udesinh and accused No.1 inflicted blow on the throat of deceased. Thereafter Chandubhai Vaghabhai came at the scene of offence and he involved other three accused thereafter. This is

the whole story narrated by Ravjibhai in his deposition about the incident. Now, perusing and appreciating the evidence of the Investigating Officer PW-12 Girdharlal Ratanlal Gadhavi, in para-13, it is established that injured Ravjibhai did not state before the police that on calling by the accused he went to the accused. He did not state before the police that Chhotabhai Babarbhai Parmar (accused No.1) inflicted blow on his head which was landed on his hand and, therefore, his hand was seriously injured. He did not state before the police that deceased Udesinh intervened to save him and he had a cogged part of dharia with him and in scuffle to snatch said cogged part of dharia, Udesinh was also involved in the incident. He did not state before the police that accused No.2 Ravjibhai Babarbhai inflicted two blows of dharia on deceased Udesinh. He did not state before the police that accused No.1 Chhotabhai Babarbhai inflicted a knocking blow on the throat of deceased Udesinh. He did not state before the police that, in the meantime, PW-5 Chandubhai Vaghabhai came on the scene and requested accused not to beat Ravjibhai. According to the learned Trial Judge, whatever injured witness Ravjibhai stated before the court in respect of the occurrence of the incident was not stated by him before the police, which related to the major and crux part of the incident and, therefore, the whole evidence of this injured witness was destroyed and his evidence was rendered unreliable. When the prosecution case was

originally that Udesinh and injured Ravjibhai had no weapons in their hands when they were passing through near the house of Budhabhai Khatarbhai Raval. According to Trial Judge, this witness attempts to explain injuries on accused No.1, but this half hearted attempt on the part of injured witnesses Ravjibhai creates doubt in the evidence of this witness and again his credibility is impeached.

27 About the evidence of PW-5, third effective witness of prosecution, Chandubhai Vaghabhai, examined at Exhibit – 20, Trial Judge, after appreciating the evidence, observed that an attempt has been made by this witness as if he had witnessed the whole incident, but considering the circumstances of the prosecution case, it was revealed that PW-5 Chandubhai was not at all an eye witness because PW-3 Ravjibhai categorically stated in his evidence that PW-5 Chandubhai Vaghabhai came at the scene of offence when Udesinh and he both had fallen on the ground. This evidence is discussed by the learned Trial Judge in para-18 of his judgment. PW-5 Chandubhai Vaghabhai did not explain all the injuries received by accused No.1 in his evidence properly and this also led to the inference that Chandubhai Vaghabhai was not present at the scene of offence. The Trial Judge observed that in para-4 of his deposition Chandubhai categorically stated that when he reached near the opening of the hedge of house of Budhabhai

Khatarbhai Raval, he noticed that accused No.1 Chhotabhai Babarbhai was injured and he was bleeding, but he avoided to state that how accused No.1 got injuries. PW-5 Chandubhai Vaghabhai were accused in cross case, which was registered as Sessions Case No. 134 of 1985. Contradictions were proved to the extent that he did not state before the police that accused Chhotabhai Babarbhai inflicted a knocked blow on the throat of deceased Udesinh and this is the only witness, who involved accused Nos. 3, 4 and 5 in the incident by stating that accused No.3 Kantibhai Ravjibhai Parmar inflicted a blow of dharia on the leg of Ravjibhai Fatabhai, but it is proved that he did not state this fact before the police, and this was a major contradiction. For important and major part of his deposition, contradictions are proved and, therefore, the Trial Judge did not place any reliance on the evidence of this witness. Along with this fact, according to Trial Judge, it could not be ignored that it has been proved through the evidence of Investigating Officer that in cross case two dharias were discovered from this witness. At least, according to Trial Judge, while appreciating the evidence, the fact is concealed by the witness that he was having a weapon with him and Ravjibhai injured had also a weapon with him. On the whole, for the above reasons, the Trial Judge did not place any reliance on this witness also.

28 Regarding discovery of dharias from the accused vide panchnama Exhibit – 25, Trial Judge observed that panch Valimohmad Satarbhai, PW-8, examined at Exhibit – 23 on material particular did not support the panchnama and prosecution case. While second panch of this panchnama PW-9 Ashabhai Gotabhai, examined at Exhibit – 24, was declared hostile. In his cross-examination by learned APP, he attempted to support the panchnama but this evidence could not be taken, according to learned Trial Judge, in consideration as substantive evidence. Further the Trial Judge observed that in cross-examination by the defence, it was revealed that, panch Ashabhai Gotabhai was an interested witness because he had been to the police station for his personal work, which was done by the police and thereafter he was taken as panch in this panchnama and, therefore, the Trial Judge did not place any reliance on the evidence. In respect of Discovery of dharias from the accused, Trial Judge also appreciated the evidence of the Investigating Officer, who stated in his deposition that, accused Ravjibhai was arrested on 22.30 hours and he was interrogated for about an hour about dharia, but nothing fruitful was found. On the next day also interrogation continued, but till 13.00 hours, nothing fruitful was found and thereafter suddenly the accused, according to prosecution case, was ready to show where had he concealed dharias. Therefore, learned Trail Judge concluded that the evidence of discovery

also was not believable.

29 The learned Trial Judge also referred to other infirmities in prosecution case and observed that dharia was a sharp edged weapon. While according to Medical Officer Dr. Mukesh Indukumar Shukla, examined at Exhibit – 18, the injured had lacerated wounds in shape of injury Nos. 1 and 2. In fact, had the injuries been caused by sharp weapon like dharia, it would not have been lacerated wounds but it would have been pierced wound. Those were the infirmities in the case of deceased Udesinh Dahyabhai also when PW-1 Dr. Rajendraprasad Dhirajbhai Purani stated that Udesinh Dahyabhai had lacerated wounds and not cut wounds.

30 Therefore, the learned Trial Judge after considering the evidence of all effective three witnesses as a whole and discovery evidence, came to the conclusion that, at initial version, only accused Nos. 1 and 2 were involved, and according to prosecution case there was a cross case in respect of the same incident, in which accused No.1 had also injuries. It was the prosecution case that, in the present incident PW-3 Ravjibhai Fatabhai and deceased Udesinh Dahyabhai had no weapons, while in the cross case, admittedly, two dharias from PW-5 Chandubhai Vaghabhai were discovered. In this tenor of the

evidence of prosecution, if the accused No.2 Ravjibhai Babarbhai was present at the scene of offence, in ordinary course of the incident, he must have received some injuries, but he did not receive any injury and, therefore, the presence shown by the prosecution at the scene of offence in respect of accused No.2 and accused Nos. 3, 4 and 5 becomes doubtful.

31 Thus the learned Trial Judge came to the conclusion that the prosecution, firstly, failed to establish the case beyond reasonable doubt. The Trial Judge further came to the conclusion that if at all the prosecution established the case against the accused, then, according to the defence led by the defence, the accused were entitled to acquittal as the defence was more probable and more so when accused No.1 had injuries on his body and that was an established fact.

32 We have thoroughly scanned the reasons assigned by the Trial Judge as stated above. For this purpose, we have carefully gone through the evidence recorded during the trial. It must be noted that this Appeal is against the order of acquittal and the scope of the Appeal against the acquittal is well defined by law. In the matter of RAMESH BABULAL DOSHI vs. STATE OF GUJARAT, as reported in (1996) 9 SCC 225, the Apex Court in para-7 in respect of the scope of the Appeal,

observed as under :

> "7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative, the order of acquittal is not to be disturbed. Conversely, if the

appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

33 In the matter of AJIT SAVANT MAJAGAVI vs. STATE OF KARNATAKA, as reported at (1997) 7 SCC 110 the Apex Court explained the scope of Appeals against the acquittal in para-16 as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against the order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of

witnesses and observing their conduct in the court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

34 Now, the prosecution case was not believed by the Trial Judge because the Trial Judge found the evidence of three prosecution witnesses unreliable. The credibility of witnesses depends upon many factors, like intention of a witness to speak truth, narrating the incident through human capacity and the performance of a witness in witness box. Witnesses may be stating before the Court the injuries caused to them in consistent manner, but the say of the witnesses has to be evaluated for the intrinsic worth of their deposition, and that can be assessed by appreciating the say of the witnesses keeping in view the whole structure of the prosecution case. If the evidence of a witness is found not fitting to the basic structure of the prosecution case originally propounded, and if it is found that the say of witnesses were not in consonance with the natural course of events or when it is found that there was intrinsic infirmity in the say of witnesses, their credibility is

undoubtedly said to have been shaken, and the doubt is created in the prosecution case. This has been actually occurred in the present incident. No doubt, the law as it stands today, it is not the universal rule that in all cases, prosecution is duty bound to explain the injuries inflicted on the body of the accused because during occurrence of the incident one may notice and one may not notice all aspects of the incident. It all depends upon the facts and circumstances of each case. Ordinarily, when ocular evidence is found cogent, trustworthy, reliable and inspiring confidence, the injuries found on the body of the accused in the same incident, may not assume any importance, but in case like this, when FIR is filed late, for which no explanation is coming forward, the fact that all the three injured including accused were at the same time were sent to the hospital, when it is found that injured witness intentionally conceals major part of the incident, and the only other eye witness could not convince the court about his presence at the scene of offence, the only available course to the court would be to come to the conclusion that the witnesses were concealing the genesis of the incident. It clearly appears that neither the prosecution witnesses are extremely truthful nor accused in their defence brought wholly true version, as to convince the court. To that limited extent, we disagree with the trial court that the defence, as set up by the Trial Court, was probable. In fact, the question of

considering the defence would arise only when prosecution establishes its case beyond doubt, and it was established beyond doubt that it was the prosecution party which was aggressor. In those circumstances, the question of considering right of private defence would arise. In the present case, we do agree with the reasoning of the Trial Judge that the prosecution failed to establish the case against the accused beyond reasonable doubt and thereafter the further probe to ascertain the probability of the defence was a futile exercise. Undoubtedly, as discussed above, the prosecution evidence is neither here nor there to come to a definite conclusion that the incident occurred in the manner as has been stated by the prosecution witnesses, resulted in injuries to PW-3 Ravjibhai Fatabhai and death of Udesinh. As discussed above, many faults were found in the prosecution case as to impeach the credibility of the witnesses. We also found major contradictions in respect of pivotal part of the prosecution case shaking the whole basic structure of the prosecution case. We have discussed these infirmities aforesaid and we come to the conclusion that relying upon those infirmities, the learned Trial Judge came to the right conclusion that the prosecution failed to prove its case beyond reasonable doubt. The appreciation of evidence by the Trial Court is found extremely proper and as per the set norms of criminal jurisprudence. Therefore, the reasons recorded by the Trial Court and findings arrived at of the

acquittal are based upon the proper appreciation of evidence. By no stretch of reasoning it could be said that findings arrived at by Trial Judge are palpably wrong, manifestly erroneous, or demonstrably unsustainable. We do not find that the judgment and order impugned in this Appeal acquitting the present respondents warrants any interference at our hands. We cannot agree with the submissions made by learned APP, as noted above. In this view of the matter, the following final order :

"The Appeal stands dismissed. Bailable warrants issued against each of the respondents stand cancelled."

(J. R. VORA, J.)

(SMT. ABHILASHA KUMARI, J.)

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